Ashley M. Gjovik, JD
In Propria Persona
2108 N St. Ste. 4553
Sacramento, CA, 95816
(408) 883-4428
legal@ashleygjovik.com

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ASHLEY M. GJOVIK, *an individual*, Plaintiff, vs. **APPLE INC.**, a corporation, Defendant.	Case No. 3:23-CV-04597-EMC **PLAINTIFF'S OPPOSITION TO DEFENDANT'S EMERGENCY MOTION TO DISMISS** Fed. R. Civ. P. 41(B)

I. Table of Contents

Points & Authorities

1. Plaintiff, Ashley Gjovik, respectfully submits the following Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss and Motion for Shortened Time, at Docket No. 131 & 132. Defendant's Motions should be denied as they are improper and without merit.

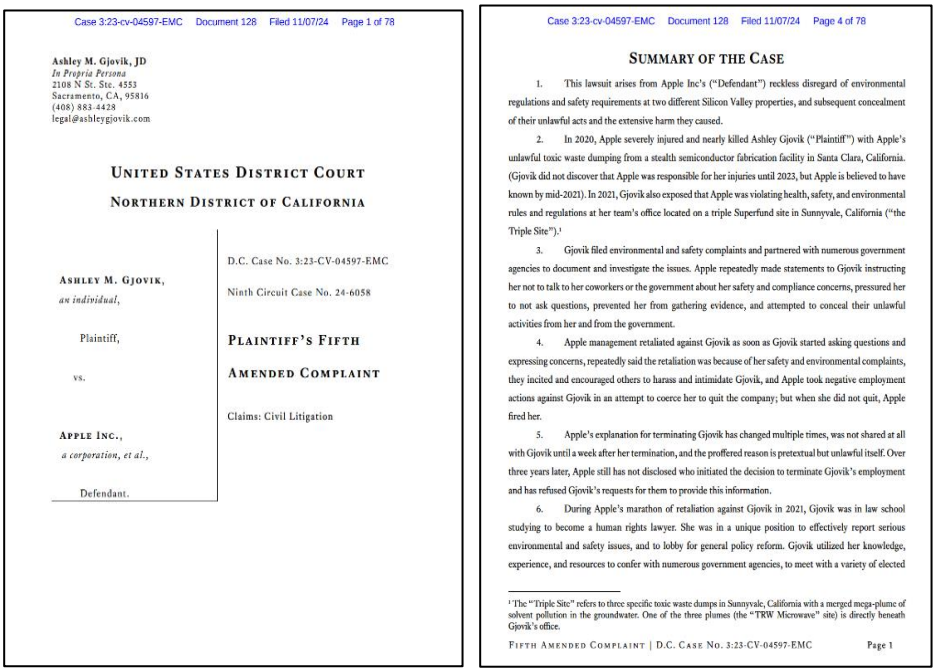
II. Issues to be Decided

2. This court has to decide whether to grant Apple's motion for an emergency decision on their Motion to Dismiss with prejudice due to Plaintiff's failure to follow a court order. If this Court denies Defendant's motions, then the court must decide whether to give Apple an extension on filing their next response to the latest complaint.

Plaintiff responds to both motions here, despite only being provided two days, in order to allow this court to quickly deny Defendant's motions and order them to respond to her complaint. Their request for an extension should also be denied due to unclean hands – though a two day extension from the original deadline, due to Plaintiff's delay, is fine.

III. Arguments

3. Here, Defendant has filed two frivolous and harassing motions, accusing Plaintiff of misconduct and "malfeasance" for filing her complaint with a two day delay due to time needed to deal with manifestations of severe emotional distress intentionally caused by the Defendant, for changing the font she used in her filings back in July 2024, for adjusting the spacing of lines in her filing, and for not including line numbers in her latest complaint.



Case 3:23-cv-04597-EMC Document 128 Filed 11/07/24 Page 1 of 78

Ashley M. Gjovik, JD
In Propria Persona
2108 N St. Ste. 4553
Sacramento, CA, 95816
(408) 883-4428
legal@ashleygjovik.com

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ASHLEY M. GJOVIK,
an individual,

Plaintiff,

vs.

APPLE INC.,
a corporation, et al.,

Defendant.

D.C. Case No. 3:23-CV-04597-EMC

Ninth Circuit Case No. 24-6058

PLAINTIFF'S FIFTH AMENDED COMPLAINT

Claims: Civil Litigation

Case 3:23-cv-04597-EMC Document 128 Filed 11/07/24 Page 4 of 78

SUMMARY OF THE CASE

1. This lawsuit arises from Apple Inc's ("Defendant") reckless disregard of environmental regulations and safety requirements at two different Silicon Valley properties, and subsequent concealment of their unlawful acts and the extensive harm they caused.

2. In 2020, Apple severely injured and nearly killed Ashley Gjovik ("Plaintiff") with Apple's unlawful toxic waste dumping from a stealth semiconductor fabrication facility in Santa Clara, California. (Gjovik did not discover that Apple was responsible for her injuries until 2023, but Apple is believed to have known by mid-2021). In 2021, Gjovik also exposed that Apple was violating health, safety, and environmental rules and regulations at her team's office located on a triple Superfund site in Sunnyvale, California ("the Triple Site").[1]

3. Gjovik filed environmental and safety complaints and partnered with numerous government agencies to document and investigate the issues. Apple repeatedly made statements to Gjovik instructing her not to talk to her coworkers or the government about her safety and compliance concerns, pressured her to not ask questions, prevented her from gathering evidence, and attempted to conceal their unlawful activities from her and from the government.

4. Apple management retaliated against Gjovik as soon as Gjovik started asking questions and expressing concerns, repeatedly said the retaliation was because of her safety and environmental complaints, they incited and encouraged others to harass and intimidate Gjovik, and Apple took negative employment actions against Gjovik in an attempt to coerce her to quit the company; but when she did not quit, Apple fired her.

5. Apple's explanation for terminating Gjovik has changed multiple times, was not shared at all with Gjovik until a week after her termination, and the proffered reason is pretextual but unlawful itself. Over three years later, Apple still has not disclosed who initiated the decision to terminate Gjovik's employment and has refused Gjovik's requests for them to provide this information.

6. During Apple's marathon of retaliation against Gjovik in 2021, Gjovik was in law school studying to become a human rights lawyer. She was in a unique position to effectively report serious environmental and safety issues, and to lobby for general policy reform. Gjovik utilized her knowledge, experience, and resources to confer with numerous government agencies, to meet with a variety of elected

[1] The "Triple Site" refers to three specific toxic waste dumps in Sunnyvale, California with a merged mega-plume of solvent pollution in the groundwater. One of the three plumes (the "TRW Microwave" site) is directly beneath Gjovik's office.

FIFTH AMENDED COMPLAINT | D.C. CASE NO. 3:23-CV-04597-EMC Page 1

Plaintiff's Fifth Amended Complaint in question.

A. The cases Apple cites are not comparable.

4. The handful of cases Apple cites for its motions are not relevant here. Apple cited *Powerteq, LLC v. Moton,* No. C-15-2626 MMC, 2016 WL 80558, at *1 (N.D. Cal. Jan. 7, 2016) related to numbered lines, but the cite is to errata in a footnote of an unpublished case. Apple cited *Monegas v. City & Cnty. of San Francisco Dep't of Pub. Health*, No. 22-CV-04633-JSW, 2023 WL 5671933, at *2 (N.D. Cal. Sept. 1, 2023), related to filing past a deadline, but in that case the court found there was no merit in the claims, the person failed to file the case within the time limit set for EEOC right to sue letters, and the person failed to plead a statute of limitations tolling theory.

5. Apple cited *Mostowfi v. I2 Telecom Int'l Inc.,* No. C-03-5784 VRW, 2006 WL 8443121, at *9 (N.D. Cal. Mar. 27, 2006), aff'd, 269 F. App'x 621 (9th Cir. 2008) related to a change in pleading formatting implying bad faith, but in that case the dismissal was primarily based on the plaintiff's failure to provide

citations, despite being ordered to prior, and counsel admitted expressly to attempting to evade page limits.

6. Apple cited *Mandell v. Am. Exp. Travel Related Servs. Co., 933 F.2d 1014 (9th Cir. 1991)* related to a pro se plaintiff missing a deadline, but in that case the Plaintiff's "*claims [were] wholly without merit.*" Apple cited *Gutierrez v. City of Colton,* No. CV 07-4934 ODW (SSX), 2008 WL 11410020, at *4 (C.D. Cal. June 9, 2008) related to the court granting an extension, but that case is referencing failure to prosecute where the statute of limitations had expired for most claims. None of these cases are relevant here – and they are the only cases that Apple cites as a legal basis for its request.

B. FRCP Rule 41(b) dismissal requires a party to fail to comply with a court order and a display of willful or contumacious conduct.

7. Plaintiff did note engage in willful or contumacious conduct, and therefore 41(B) is not applicable here. "[T]rial courts possess only a narrow inherent authority to dismiss claims based on limited circumstances (e.g., cases involving a failure to prosecute, frivolous claims, or egregious misconduct)." *Estrada v. Royalty Carpet Mills, Inc.,* 15 Cal. 5th 582, 317 Cal. Rptr. 3d 219, 541 P.3d 466 (Cal. 2024). Mere failure to comply with an order of court does not of itself establish the propriety of invoking Fed. R. Civ. P. 41(b). *Gordon v. Federal Deposit Ins. Corp.,* 427 F.2d 578, 13 Fed. R. Serv. 2d 811 (D.C. Cir. 1970)

8. Intent of the plaintiff is an important, indeed crucial, factor considered by the courts, dismissals being limited to intentional, willful, or flagrant noncompliance, or repeated failures to comply from which willfulness or extreme dilatoriness may be inferred. *Jones v. Thompson,* 996 F.2d 261, 26 Fed. R. Serv. 3d 239 (10th Cir. 1993); *Tatum v. Liberty Housing Co.*, 726 F.2d 410 (8th Cir. 1984) If counsel presents a substantial question and is not outrightly defiant, a lesser sanction may be appropriate, under the court's authority to make such order

as is just. *Gordon v. Fed. Deposit Ins. Corp.*, 427 F.2d 578, 581 (D.C. Cir. 1970) *Syracuse Broadcasting Corp. v. Newhouse,* 271 F.2d 910, 914 (2d Cir. 1959); cf. *Campbell v. Eastland,* 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502 (1963).

9. "The necessity justification for the contempt authority is at its pinnacle, of course, where contumacious conduct threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the court." *Int'l Union v. Bagwell*, 512 U.S. 821, 832 (1994). An example of a pro se plaintiff engaging in "highly contemptuous" conduct that was appropriate for a trial court to dismiss the case due to the conduct was when where a self-represented attorney plaintiff threatened to use pepper spray and taser against opposing counsel. *Crawford v. JPMorgan Chase Bank, N.A.* (2015) 242 CA4th 1265, 1271, 195 CR3d 868, 873. That is nothing like what happened here.

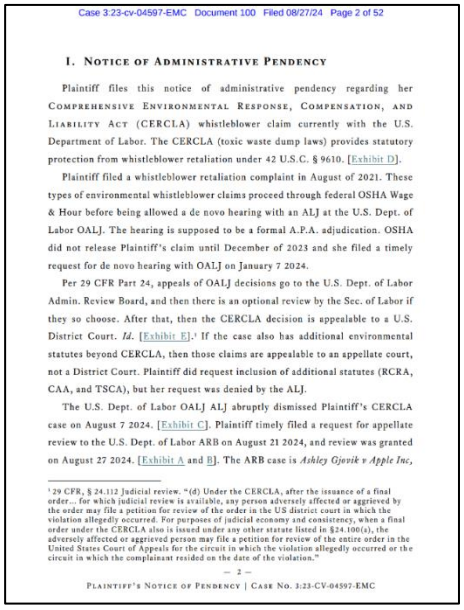
10. There are three reasons why Apple's argument that Plaintiff engaged in bad faith evidenced by her changed formatting in her complaint – is completely without merit. First, she changed her formatting months ago. Second, the type of formatting misconduct that this district sanctions if far from what she did. And Third, even Apple has used the same formatting she did.

11. There is no evidence that Plaintiff acted in bad faith or attempted to defy the court.

1. Defendant claims Plaintiff changed the formatting and layout of her legal filings starting with her Fifth Amended Complaint. This is not true.

12. Apple claimed the Plaintiff changed her formatting, font, line spacing, etc. just for this Fifth Amended Complaint, and did not change it prior. That's is demonstrably false. Plaintiff changed her formatting and fonts in July of 2024, following the Typography for Lawyers guidebook and typeface. (See Exhibit

A). Nothing Plaintiff did was malfeasance or contempt.



Case 3:23-cv-04597-EMC Document 100 Filed 08/27/24 Page 2 of 52

I. Notice of Administrative Pendency

Plaintiff files this notice of administrative pendency regarding her Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) whistleblower claim currently with the U.S. Department of Labor. The CERCLA (toxic waste dump laws) provides statutory protection from whistleblower retaliation under 42 U.S.C. § 9610. [Exhibit D].

Plaintiff filed a whistleblower retaliation complaint in August of 2021. These types of environmental whistleblower claims proceed through federal OSHA Wage & Hour before being allowed a de novo hearing with an ALJ at the U.S. Dept. of Labor OALJ. The hearing is supposed to be a formal A.P.A. adjudication. OSHA did not release Plaintiff's claim until December of 2023 and she filed a timely request for de novo hearing with OALJ on January 7 2024.

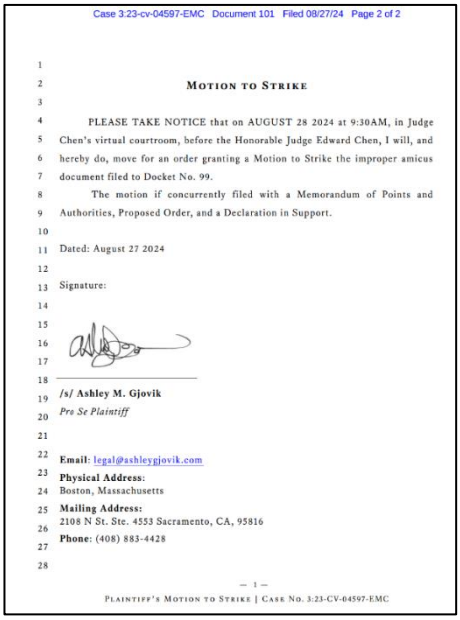
Per 29 CFR Part 24, appeals of OALJ decisions go to the U.S. Dept. of Labor Admin. Review Board, and then there is an optional review by the Sec. of Labor if they so choose. After that, then the CERCLA decision is appealable to a U.S. District Court. *Id.* [Exhibit E].[1] If the case also has additional environmental statutes beyond CERCLA, then those claims are appealable to an appellate court, not a District Court. Plaintiff did request inclusion of additional statutes (RCRA, CAA, and TSCA), but her request was denied by the ALJ.

The U.S. Dept. of Labor OALJ ALJ abruptly dismissed Plaintiff's CERCLA case on August 7 2024. [Exhibit C]. Plaintiff timely filed a request for appellate review to the U.S. Dept. of Labor ARB on August 21 2024, and review was granted on August 27 2024. [Exhibit A and B]. The ARB case is *Ashley Gjovik v Apple Inc,*

[1] 29 CFR, § 24.112 Judicial review. "(d) Under the CERCLA, after the issuance of a final order…for which judicial review is available, any person adversely affected or aggrieved by the order may file a petition for review of the order in the US district court in which the violation allegedly occurred. For purposes of judicial economy and consistency, when a final order under the CERCLA also is issued under any other statute listed in §24.100(a), the adversely affected or aggrieved person may file a petition for review of the entire order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation."

– 2 –

Plaintiff's Notice of Pendency | Case No. 3:23-CV-04597-EMC



Case 3:23-cv-04597-EMC Document 101 Filed 08/27/24 Page 2 of 2

Motion to Strike

PLEASE TAKE NOTICE that on AUGUST 28 2024 at 9:30AM, in Judge Chen's virtual courtroom, before the Honorable Judge Edward Chen, I will, and hereby do, move for an order granting a Motion to Strike the improper amicus document filed to Docket No. 99.

The motion if concurrently filed with a Memorandum of Points and Authorities, Proposed Order, and a Declaration in Support.

Dated: August 27 2024

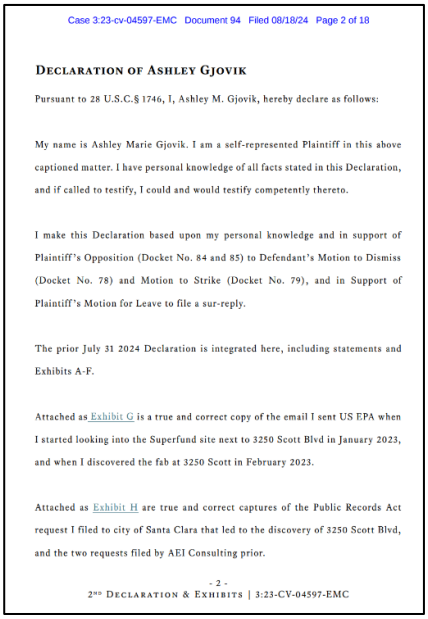
Signature:

/s/ Ashley M. Gjovik
Pro Se Plaintiff

Email: legal@ashleygjovik.com
Physical Address:
Boston, Massachusetts
Mailing Address:
2108 N St. Ste. 4553 Sacramento, CA, 95816
Phone: (408) 883-4428

– 1 –

Plaintiff's Motion to Strike | Case No. 3:23-CV-04597-EMC



Case 3:23-cv-04597-EMC Document 94 Filed 08/18/24 Page 2 of 18

Declaration of Ashley Gjovik

Pursuant to 28 U.S.C.§ 1746, I, Ashley M. Gjovik, hereby declare as follows:

My name is Ashley Marie Gjovik. I am a self-represented Plaintiff in this above captioned matter. I have personal knowledge of all facts stated in this Declaration, and if called to testify, I could and would testify competently thereto.

I make this Declaration based upon my personal knowledge and in support of Plaintiff's Opposition (Docket No. 84 and 85) to Defendant's Motion to Dismiss (Docket No. 78) and Motion to Strike (Docket No. 79), and in Support of Plaintiff's Motion for Leave to file a sur-reply.

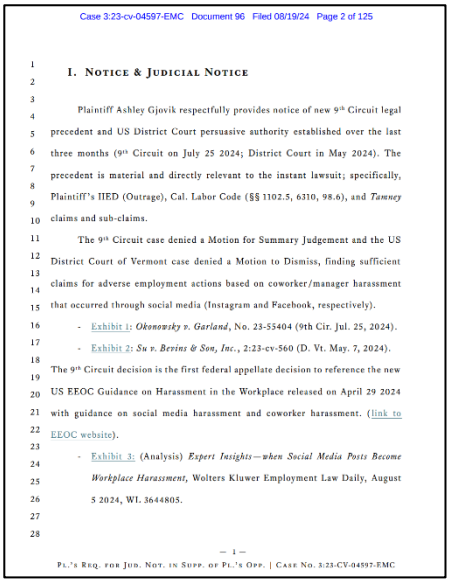
The prior July 31 2024 Declaration is integrated here, including statements and Exhibits A-F.

Attached as Exhibit G is a true and correct copy of the email I sent US EPA when I started looking into the Superfund site next to 3250 Scott Blvd in January 2023, and when I discovered the fab at 3250 Scott in February 2023.

Attached as Exhibit H are true and correct captures of the Public Records Act request I filed to city of Santa Clara that led to the discovery of 3250 Scott Blvd, and the two requests filed by AEI Consulting prior.

- 2 -

2nd Declaration & Exhibits | 3:23-CV-04597-EMC



Case 3:23-cv-04597-EMC Document 96 Filed 08/19/24 Page 2 of 125

I. Notice & Judicial Notice

Plaintiff Ashley Gjovik respectfully provides notice of new 9th Circuit legal precedent and US District Court persuasive authority established over the last three months (9th Circuit on July 25 2024; District Court in May 2024). The precedent is material and directly relevant to the instant lawsuit; specifically, Plaintiff's IIED (Outrage), Cal. Labor Code (§§ 1102.5, 6310, 98.6), and *Tanney* claims and sub-claims.

The 9th Circuit case denied a Motion for Summary Judgement and the US District Court of Vermont case denied a Motion to Dismiss, finding sufficient claims for adverse employment actions based on coworker/manager harassment that occurred through social media (Instagram and Facebook, respectively).

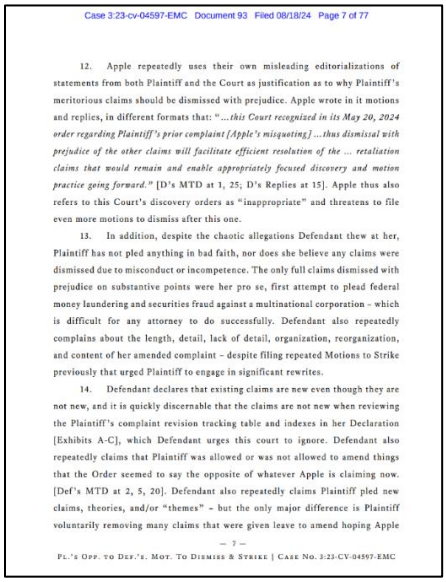
- Exhibit 1: *Okonowsky v. Garland*, No. 23-55404 (9th Cir. Jul. 25, 2024).
- Exhibit 2: *Su v. Bevins & Son, Inc.*, 2:23-cv-560 (D. Vt. May. 7, 2024).

The 9th Circuit decision is the first federal appellate decision to reference the new US EEOC Guidance on Harassment in the Workplace released on April 29 2024 with guidance on social media harassment and coworker harassment. (link to EEOC website).

- Exhibit 3: (Analysis) *Expert Insights—when Social Media Posts Become Workplace Harassment,* Wolters Kluwer Employment Law Daily, August 5 2024, WL 3644805.

– 1 –

Pl.'s Req. for Jud. Not. in Supp. of Pl.'s Opp. | Case No. 3:23-CV-04597-EMC



Case 3:23-cv-04597-EMC Document 93 Filed 08/18/24 Page 7 of 77

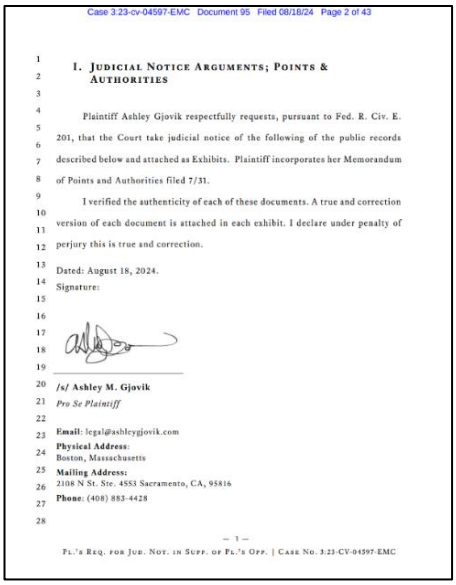
12. Apple repeatedly uses their own misleading editorializations of statements from both Plaintiff and the Court as justification as to why Plaintiff's meritorious claims should be dismissed with prejudice. Apple wrote in it motions and replies, in different formats that: "*…this Court recognized in its May 20, 2024 order regarding Plaintiff's prior complaint [Apple's misquoting]…thus dismissal with prejudice of the other claims will facilitate efficient resolution of the … retaliation claims that would remain and enable appropriately focused discovery and motion practice going forward.*" [D's MTD at 1, 25; D's Replies at 15]. Apple thus also refers to this Court's discovery orders as "inappropriate" and threatens to file even more motions to dismiss after this one.

13. In addition, despite the chaotic allegations Defendant threw at her, Plaintiff has not pled anything in bad faith, nor does she believe any claims were dismissed due to misconduct or incompetence. The only full claims dismissed with prejudice on substantive points were her pro se, first attempt to plead federal money laundering and securities fraud against a multinational corporation – which is difficult for any attorney to do successfully. Defendant also repeatedly complains about the length, detail, lack of detail, organization, reorganization, and content of her amended complaint – despite filing repeated Motions to Strike previously that urged Plaintiff to engage in significant rewrites.

14. Defendant declares that existing claims are new even though they are not new, and it is quickly discernable that the claims are not new when reviewing the Plaintiff's complaint revision tracking table and indexes in her Declaration [Exhibits A-C], which Defendant urges this court to ignore. Defendant also repeatedly claims that Plaintiff was allowed or was not allowed to amend things that the Order seemed to say the opposite of whatever Apple is claiming now. [Def's MTD at 2, 5, 20]. Defendant also repeatedly claims Plaintiff pled new claims, theories, and/or "themes" – but the only major difference is Plaintiff voluntarily removing many claims that were given leave to amend hoping Apple

– 7 –

Pl.'s Opp. to Def.'s. Mot. To Dismiss & Strike | Case No. 3:23-CV-04597-EMC



Case 3:23-cv-04597-EMC Document 95 Filed 08/18/24 Page 2 of 43

I. Judicial Notice Arguments; Points & Authorities

Plaintiff Ashley Gjovik respectfully requests, pursuant to Fed. R. Civ. E. 201, that the Court take judicial notice of the following of the public records described below and attached as Exhibits. Plaintiff incorporates her Memorandum of Points and Authorities filed 7/31.

I verified the authenticity of each of these documents. A true and correction version of each document is attached in each exhibit. I declare under penalty of perjury this is true and correction.

Dated: August 18, 2024.
Signature:

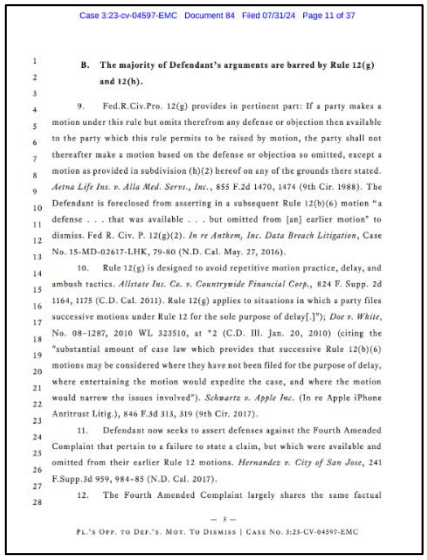
/s/ Ashley M. Gjovik
Pro Se Plaintiff

Email: legal@ashleygjovik.com
Physical Address:
Boston, Massachusetts
Mailing Address:
2108 N St. Ste. 4553 Sacramento, CA, 95816
Phone: (408) 883-4428

– 1 –

Pl.'s Req. for Jud. Not. in Supp. of Pl.'s Opp. | Case No. 3:23-CV-04597-EMC

Plaintiff's filing to this case in August & September 2024.


Case 3:23-cv-04597-EMC Document 84 Filed 07/31/24 Page 11 of 37

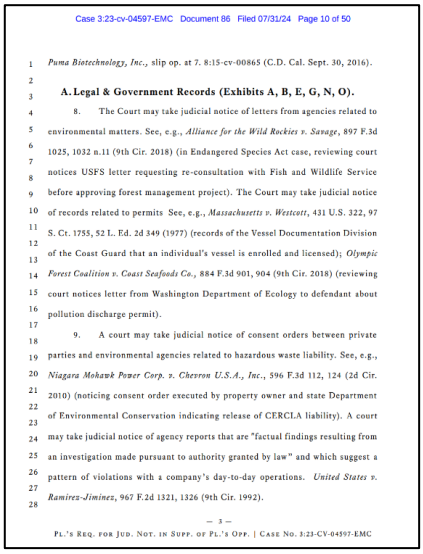
B. The majority of Defendant's arguments are barred by Rule 12(g) and 12(h).

9. Fed.R.Civ.Pro. 12(g) provides in pertinent part: If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated. *Aetna Life Ins. v. Alla Med. Servs., Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988). The Defendant is foreclosed from asserting in a subsequent Rule 12(b)(6) motion "a defense . . . that was available . . . but omitted from [an] earlier motion" to dismiss. Fed R. Civ. P. 12(g)(2). *In re Anthem, Inc. Data Breach Litigation*, Case No. 15-MD-02617-LHK, 79-80 (N.D. Cal. May. 27, 2016).

10. Rule 12(g) is designed to avoid repetitive motion practice, delay, and ambush tactics. *Allstate Ins. Co. v. Countrywide Financial Corp.*, 824 F. Supp. 2d 1164, 1175 (C.D. Cal. 2011). Rule 12(g) applies to situations in which a party files successive motions under Rule 12 for the sole purpose of delay[.]"); *Doe v. White*, No. 08-1287, 2010 WL 323510, at *2 (C.D. Ill. Jan. 20, 2010) (citing the "substantial amount of case law which provides that successive Rule 12(b)(6) motions may be considered where they have not been filed for the purpose of delay, where entertaining the motion would expedite the case, and where the motion would narrow the issues involved"). *Schwartz v. Apple Inc.* (In re Apple iPhone Antitrust Litig.), 846 F.3d 313, 319 (9th Cir. 2017).

11. Defendant now seeks to assert defenses against the Fourth Amended Complaint that pertain to a failure to state a claim, but which were available and omitted from their earlier Rule 12 motions. *Hernandez v. City of San Jose*, 241 F.Supp.3d 959, 984-85 (N.D. Cal. 2017).

12. The Fourth Amended Complaint largely shares the same factual

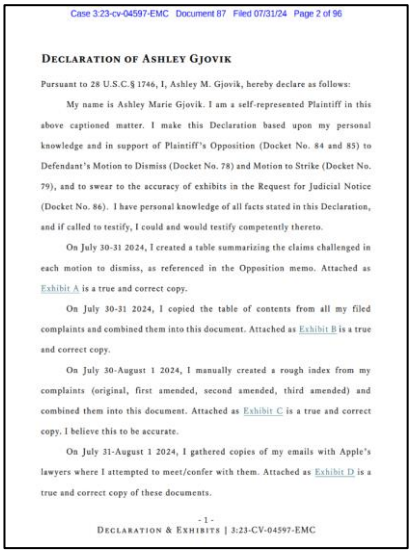

Case 3:23-cv-04597-EMC Document 86 Filed 07/31/24 Page 10 of 50

Puma Biotechnology, Inc., slip op. at 7. 8:15-cv-00865 (C.D. Cal. Sept. 30, 2016).

A. Legal & Government Records (Exhibits A, B, E, G, N, O).

8. The Court may take judicial notice of letters from agencies related to environmental matters. See, e.g., *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1032 n.11 (9th Cir. 2018) (in Endangered Species Act case, reviewing court notices USFS letter requesting re-consultation with Fish and Wildlife Service before approving forest management project). The Court may take judicial notice of records related to permits See, e.g., *Massachusetts v. Westcott*, 431 U.S. 322, 97 S. Ct. 1755, 52 L. Ed. 2d 349 (1977) (records of the Vessel Documentation Division of the Coast Guard that an individual's vessel is enrolled and licensed); *Olympic Forest Coalition v. Coast Seafoods Co.*, 884 F.3d 901, 904 (9th Cir. 2018) (reviewing court notices letter from Washington Department of Ecology to defendant about pollution discharge permit).

9. A court may take judicial notice of consent orders between private parties and environmental agencies related to hazardous waste liability. See, e.g., *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 124 (2d Cir. 2010) (noticing consent order executed by property owner and state Department of Environmental Conservation indicating release of CERCLA liability). A court may take judicial notice of agency reports that are "factual findings resulting from an investigation made pursuant to authority granted by law" and which suggest a pattern of violations with a company's day-to-day operations. *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1326 (9th Cir. 1992).


Case 3:23-cv-04597-EMC Document 87 Filed 07/31/24 Page 2 of 96

DECLARATION OF ASHLEY GJOVIK

Pursuant to 28 U.S.C.§ 1746, I, Ashley M. Gjovik, hereby declare as follows:

My name is Ashley Marie Gjovik. I am a self-represented Plaintiff in this above captioned matter. I make this Declaration based upon my personal knowledge and in support of Plaintiff's Opposition (Docket No. 84 and 85) to Defendant's Motion to Dismiss (Docket No. 78) and Motion to Strike (Docket No. 79), and to swear to the accuracy of exhibits in the Request for Judicial Notice (Docket No. 86). I have personal knowledge of all facts stated in this Declaration, and if called to testify, I could and would testify competently thereto.

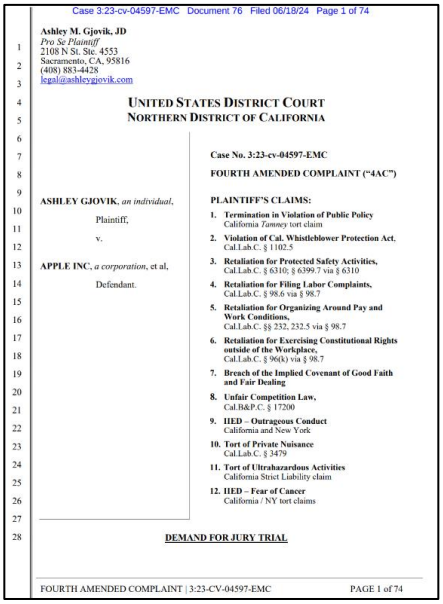
On July 30-31 2024, I created a table summarizing the claims challenged in each motion to dismiss, as referenced in the Opposition memo. Attached as Exhibit A is a true and correct copy.

On July 30-31 2024, I copied the table of contents from all my filed complaints and combined them into this document. Attached as Exhibit B is a true and correct copy.

On July 30-August 1 2024, I manually created a rough index from my complaints (original, first amended, second amended, third amended) and combined them into this document. Attached as Exhibit C is a true and correct copy. I believe this to be accurate.

On July 31-August 1 2024, I gathered copies of my emails with Apple's lawyers where I attempted to meet/confer with them. Attached as Exhibit D is a true and correct copy of these documents.

Plaintiff's filing to this case in July 2024 – with new format.


Case 3:23-cv-04597-EMC Document 76 Filed 06/18/24 Page 1 of 74

Ashley M. Gjovik, JD
Pro Se Plaintiff
2108 N St. Ste. 4553
Sacramento, CA, 95816
(408) 883-4428
legal@ashleygjovik.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ASHLEY GJOVIK, *an individual*,
Plaintiff,
v.
APPLE INC, *a corporation*, et al,
Defendant.

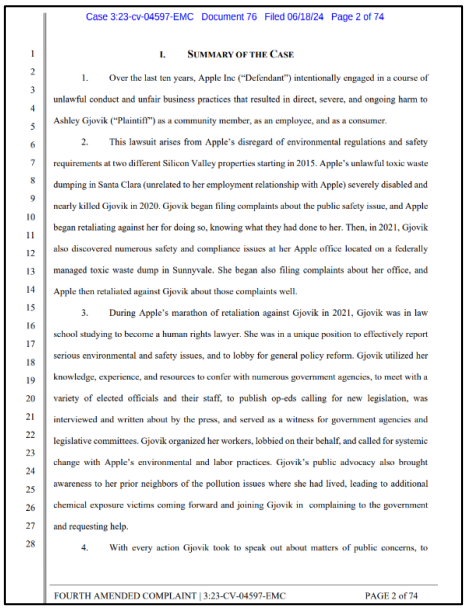
Case No. 3:23-cv-04597-EMC

FOURTH AMENDED COMPLAINT ("4AC")

PLAINTIFF'S CLAIMS:

1. **Termination in Violation of Public Policy**
California *Tameny* tort claim
2. **Violation of Cal. Whistleblower Protection Act**,
Cal.Lab.C. § 1102.5
3. **Retaliation for Protected Safety Activities,**
Cal.Lab.C. § 6310; § 6399.7 via § 6310
4. **Retaliation for Filing Labor Complaints,**
Cal.Lab.C. § 98.6 via § 98.7
5. **Retaliation for Organizing Around Pay and Work Conditions,**
Cal.Lab.C. §§ 232, 232.5 via § 98.7
6. **Retaliation for Exercising Constitutional Rights outside of the Workplace,**
Cal.Lab.C. § 96(k) via § 98.7
7. **Breach of the Implied Covenant of Good Faith and Fair Dealing**
8. **Unfair Competition Law,**
Cal.B&P.C. § 17200
9. **IIED – Outrageous Conduct**
California and New York
10. **Tort of Private Nuisance**
Cal.Lab.C. § 3479
11. **Tort of Ultrahazardous Activities**
California Strict Liability claim
12. **IIED – Fear of Cancer**
California / NY tort claims

DEMAND FOR JURY TRIAL


Case 3:23-cv-04597-EMC Document 76 Filed 06/18/24 Page 2 of 74

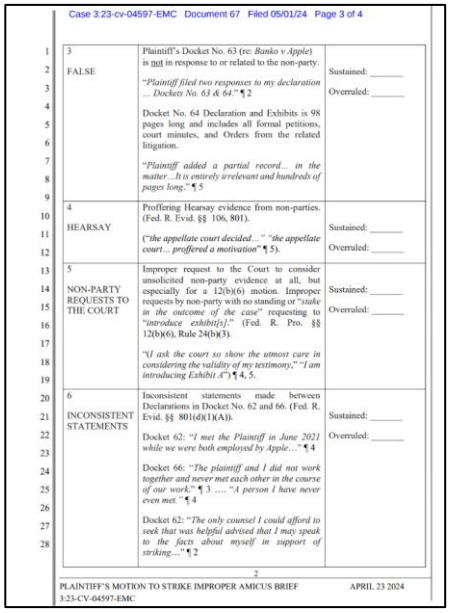
I. SUMMARY OF THE CASE

1. Over the last ten years, Apple Inc ("Defendant") intentionally engaged in a course of unlawful conduct and unfair business practices that resulted in direct, severe, and ongoing harm to Ashley Gjovik ("Plaintiff") as a community member, as an employee, and as a consumer.

2. This lawsuit arises from Apple's disregard of environmental regulations and safety requirements at two different Silicon Valley properties starting in 2015. Apple's unlawful toxic waste dumping in Santa Clara (unrelated to her employment relationship with Apple) severely disabled and nearly killed Gjovik in 2020. Gjovik began filing complaints about the public safety issue, and Apple began retaliating against her for doing so, knowing what they had done to her. Then, in 2021, Gjovik also discovered numerous safety and compliance issues at her Apple office located on a federally managed toxic waste dump in Sunnyvale. She began also filing complaints about her office, and Apple then retaliated against Gjovik about those complaints well.

3. During Apple's marathon of retaliation against Gjovik in 2021, Gjovik was in law school studying to become a human rights lawyer. She was in a unique position to effectively report serious environmental and safety issues, and to lobby for general policy reform. Gjovik utilized her knowledge, experience, and resources to confer with numerous government agencies, to meet with a variety of elected officials and their staff, to publish op-eds calling for new legislation, was interviewed and written about by the press, and served as a witness for government agencies and legislative committees. Gjovik organized her workers, lobbied on their behalf, and called for systemic change with Apple's environmental and labor practices. Gjovik's public advocacy also brought awareness to her prior neighbors of the pollution issues where she had lived, leading to additional chemical exposure victims coming forward and joining Gjovik in complaining to the government and requesting help.

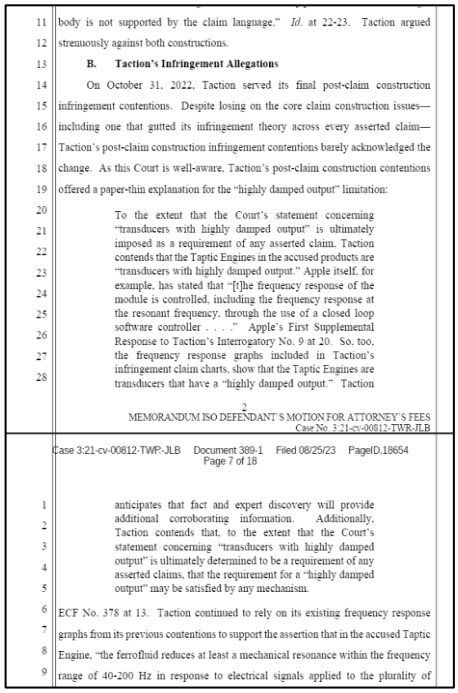
4. With every action Gjovik took to speak out about matters of public concerns, to


Case 3:23-cv-04597-EMC Document 67 Filed 05/01/24 Page 3 of 4

3 FALSE	Plaintiff's Docket No. 63 (re: *Banko v Apple*) is not in response to or related to the non-party. *"Plaintiff filed two responses to my declaration … Dockets No. 63 & 64."* ¶ 2 Docket No. 64 Declaration and Exhibits is 98 pages long and includes all formal petitions, court minutes, and Orders from the related litigation. *"Plaintiff added a partial record… in the matter…It is entirely irrelevant and hundreds of pages long."* ¶ 5	Sustained: _____ Overruled: _____
4 HEARSAY	Proffering Hearsay evidence from non-parties. (Fed. R. Evid. §§ 106, 801). *("the appellate court decided…" "the appellate court… proffered a motivation"* ¶ 5).	Sustained: _____ Overruled: _____
5 NON-PARTY REQUESTS TO THE COURT	Improper request to the Court to consider unsolicited non-party evidence at all, but especially for a 12(b)(6) motion. Improper requests by non-party with no standing or *"stake in the outcome of the case"* requesting to *"introduce exhibit[s]."* (Fed. R. Pro. §§ 12(b)(6), Rule 24(b)(3). *"(I ask the court so show the utmost care in considering the validity of my testimony," "I am introducing Exhibit A")* ¶ 4, 5.	Sustained: _____ Overruled: _____
6 INCONSISTENT STATEMENTS	Inconsistent statements made between Declarations in Docket No. 62 and 66. (Fed. R. Evid. §§ 801(d)(1)(A)). Docket 62: *"I met the Plaintiff in June 2021 while we were both employed by Apple…"* ¶ 4 Docket 66: *"The plaintiff and I did not work together and never met each other in the course of our work."* ¶ 3 …. *"A person I have never even met."* ¶ 4 Docket 62: *"The only counsel I could afford to seek that was helpful advised that I may speak to the facts about myself in support of striking…"* ¶ 2	Sustained: _____ Overruled: _____

Plaintiff's filing to this case in May-June 2024. This was the last time she used her prior formatting, roughly five months ago.

Defendant claims that Plaintiff's formatting and layout are facial violations of court rules, but Defendant has been warned for intentional and defiant formatting far worse then anything Plaintiff did here.



body is not supported by the claim language." *Id.* at 22-23. Taction argued strenuously against both constructions.

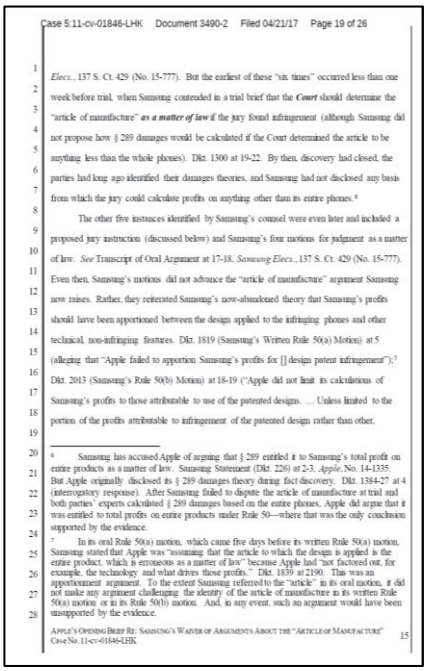
B. Taction's Infringement Allegations

On October 31, 2022, Taction served its final post-claim construction infringement contentions. Despite losing on the core claim construction issues—including one that gutted its infringement theory across every asserted claim—Taction's post-claim construction infringement contentions barely acknowledged the change. As this Court is well-aware, Taction's post-claim construction contentions offered a paper-thin explanation for the "highly damped output" limitation:

> To the extent that the Court's statement concerning "transducers with highly damped output" is ultimately imposed as a requirement of any asserted claim, Taction contends that the Taptic Engines in the accused products are "transducers with highly damped output." Apple itself, for example, has stated that "[t]he frequency response of the module is controlled, including the frequency response at the resonant frequency, through the use of a closed loop software controller . . . ." Apple's First Supplemental Response to Taction's Interrogatory No. 9 at 20. So, too, the frequency response graphs included in Taction's infringement claim charts, show that the Taptic Engines are transducers that have a "highly damped output." Taction

> anticipates that fact and expert discovery will provide additional corroborating information. Additionally, Taction contends that, to the extent that the Court's statement concerning "transducers with highly damped output" is ultimately determined to be a requirement of any asserted claims, that the requirement for a "highly damped output" may be satisfied by any mechanism.

ECF No. 378 at 13. Taction continued to rely on its existing frequency response graphs from its previous contentions to support the assertion that in the accused Taptic Engine, "the ferrofluid reduces at least a mechanical resonance within the frequency range of 40-200 Hz in response to electrical signals applied to the plurality of

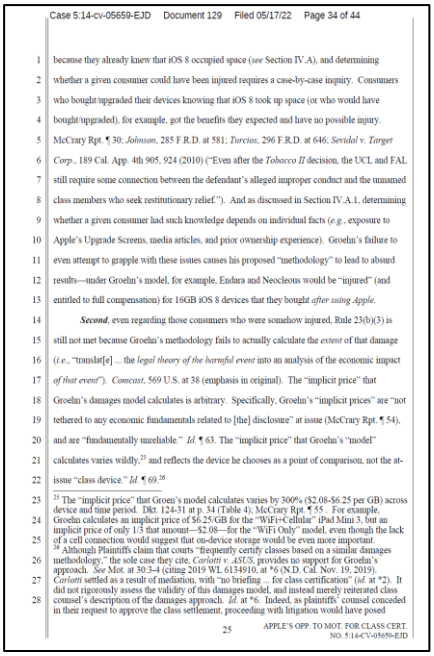


Elecs., 137 S. Ct. 429 (No. 15-777). But the earliest of these "six times" occurred less than one week before trial, when Samsung contended in a trial brief that the ***Court*** should determine the "article of manufacture" ***as a matter of law*** if the jury found infringement (although Samsung did not propose how § 289 damages would be calculated if the Court determined the article to be anything less than the whole phones). Dkt. 1300 at 19-22. By then, discovery had closed, the parties had long ago identified their damages theories, and Samsung had not disclosed any basis from which the jury could calculate profits on anything other than its entire phones.[6]

The other five instances identified by Samsung's counsel were even later and included a proposed jury instruction (discussed below) and Samsung's four motions for judgment as a matter of law. *See* Transcript of Oral Argument at 17-18, *Samsung Elecs.*, 137 S. Ct. 429 (No. 15-777). Even then, Samsung's motions did not advance the "article of manufacture" argument Samsung now raises. Rather, they reiterated Samsung's now-abandoned theory that Samsung's profits should have been apportioned between the design applied to the infringing phones and other technical, non-infringing features. Dkt. 1819 (Samsung's Written Rule 50(a) Motion) at 5 (alleging that "Apple failed to apportion Samsung's profits for [] design patent infringement");[7] Dkt. 2013 (Samsung's Rule 50(b) Motion) at 18-19 ("Apple did not limit its calculations of Samsung's profits to those attributable to use of the patented designs. … Unless limited to the portion of the profits attributable to infringement of the patented design rather than other,

[6] Samsung has accused Apple of arguing that § 289 entitled it to Samsung's total profit on entire products as a matter of law. Samsung Statement (Dkt. 226) at 2-3, *Apple*, No. 14-1335. But Apple originally disclosed its § 289 damages theory during fact discovery. Dkt. 1384-27 at 4 (interrogatory response). After Samsung failed to dispute the article of manufacture at trial and both parties' experts calculated § 289 damages based on the entire phones, Apple did argue that it was entitled to total profits on entire products under Rule 50—where that was the only conclusion supported by the evidence.

[7] In its oral Rule 50(a) motion, which came five days before its written Rule 50(a) motion, Samsung stated that Apple was "assuming that the article to which the design is applied is the entire product, which is erroneous as a matter of law" because Apple had "not factored out, for example, the technology and what drives those profits." Dkt. 1839 at 2190. This was an apportionment argument. To the extent Samsung referred to the "article" in its oral motion, it did not make any argument challenging the identity of the article of manufacture in its written Rule 50(a) motion or in its Rule 50(b) motion. And, in any event, such an argument would have been unsupported by the evidence.

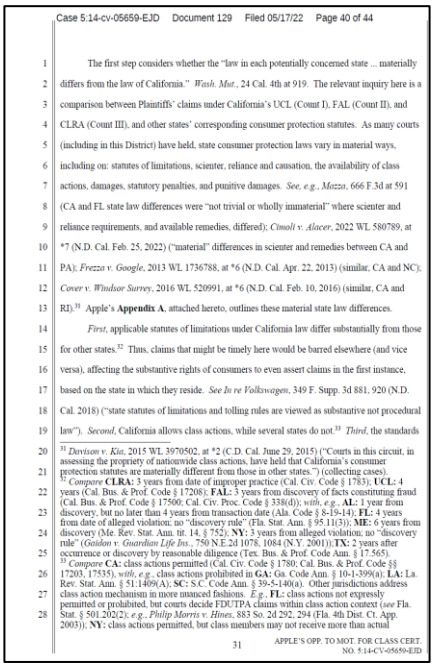


because they already knew that iOS 8 occupied space (*see* Section IV.A), and determining whether a given consumer could have been injured requires a case-by-case inquiry. Consumers who bought/upgraded their devices knowing that iOS 8 took up space (or who would have bought/upgraded), for example, got the benefits they expected and have no possible injury. McCrary Rpt. ¶ 30; *Johnson*, 285 F.R.D. at 581; *Turcios*, 296 F.R.D. at 646; *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 924 (2010) ("Even after the *Tobacco II* decision, the UCL and FAL still require some connection between the defendant's alleged improper conduct and the unnamed class members who seek restitutionary relief."). And as discussed in Section IV.A.1, determining whether a given consumer had such knowledge depends on individual facts (*e.g.*, exposure to Apple's Upgrade Screens, media articles, and prior ownership experience). Groehn's failure to even attempt to grapple with these issues causes his proposed "methodology" to lead to absurd results—under Groehn's model, for example, Endara and Neocleous would be "injured" (and entitled to full compensation) for 16GB iOS 8 devices that they bought *after suing Apple*.

Second, even regarding those consumers who were somehow injured, Rule 23(b)(3) is still not met because Groehn's methodology fails to actually calculate the *extent* of that damage (*i.e.*, "translat[e] … the *legal theory of the harmful event* into an analysis of the economic impact *of that event*"). *Comcast*, 569 U.S. at 38 (emphasis in original). The "implicit price" that Groehn's damages model calculates is arbitrary. Specifically, Groehn's "implicit prices" are "not tethered to any economic fundamentals related to [the] disclosure" at issue (McCrary Rpt. ¶ 54), and are "fundamentally unreliable." *Id.* ¶ 63. The "implicit price" that Groehn's "model" calculates varies wildly,[23] and reflects the device he chooses as a point of comparison, not the at-issue "class device." *Id.* ¶ 69.[24]

[23] The "implicit price" that Groehn's model calculates varies by 300% ($2.08-$6.25 per GB) across device and time period. Dkt. 124-31 at p. 34 (Table 4); McCrary Rpt. ¶ 55. For example, Groehn calculates an implicit price of $6.25/GB for the "WiFi+Cellular" iPad Mini 3, but an implicit price of only 1/3 that amount—$2.08—for the "WiFi Only" model, even though the lack of a cell connection would suggest that on-device storage would be even more important.

[24] Although Plaintiffs claim that courts "frequently certify classes based on a similar damages methodology," the sole case they cite, *Carlotti v. ASUS*, provides no support for Groehn's approach. *See* Mot. at 30:3-4 (citing 2019 WL 6134910, at *6 (N.D. Cal. Nov. 19, 2019). *Carlotti* settled as a result of mediation, with "no briefing … for class certification" (*id.* at *2). It did not rigorously assess the validity of this damages model, and instead merely reiterated class counsel's description of the damages approach. *Id.* at *6. Indeed, as plaintiffs' counsel conceded in their request to approve the class settlement, proceeding with litigation would have posed



The first step considers whether the "law in each potentially concerned state … materially differs from the law of California." *Wash. Mut.*, 24 Cal. 4th at 919. The relevant inquiry here is a comparison between Plaintiffs' claims under California's UCL (Count I), FAL (Count II), and CLRA (Count III), and other states' corresponding consumer protection statutes. As many courts (including in this District) have held, state consumer protection laws vary in material ways, including on: statutes of limitations, scienter, reliance and causation, the availability of class actions, damages, statutory penalties, and punitive damages. *See, e.g.*, *Mazza*, 666 F.3d at 591 (CA and FL state law differences were "not trivial or wholly immaterial" where scienter and reliance requirements, and available remedies, differed); *Cimoli v. Alacer*, 2022 WL 580789, at *7 (N.D. Cal. Feb. 25, 2022) ("material" differences in scienter and remedies between CA and PA); *Frezza v. Google*, 2013 WL 1736788, at *6 (N.D. Cal. Apr. 22, 2013) (similar, CA and NC); *Cover v. Windsor Surrey*, 2016 WL 520991, at *6 (N.D. Cal. Feb. 10, 2016) (similar, CA and RI).[31] Apple's **Appendix A**, attached hereto, outlines these material state law differences.

First, applicable statutes of limitations under California law differ substantially from those for other states.[32] Thus, claims that might be timely here would be barred elsewhere (and vice versa), affecting the substantive rights of consumers to even assert claims in the first instance, based on the state in which they reside. *See In re Volkswagen*, 349 F. Supp. 3d 881, 920 (N.D. Cal. 2018) ("state statutes of limitations and tolling rules are viewed as substantive not procedural law"). *Second*, California allows class actions, while several states do not.[33] *Third*, the standards

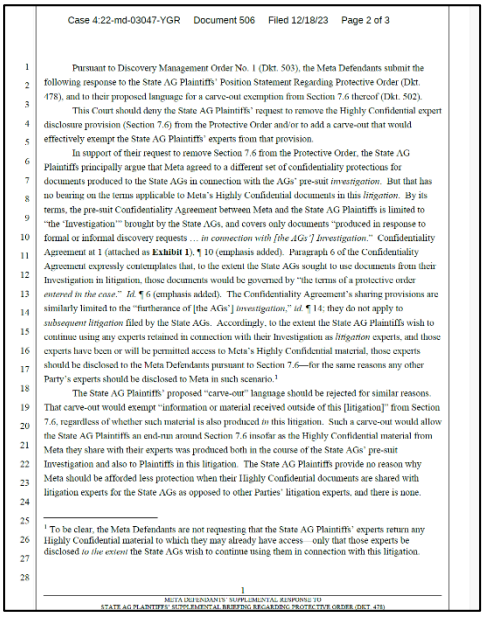
[31] *Davison v. Kia*, 2015 WL 3970502, at *2 (C.D. Cal. June 29, 2015) ("Courts in this circuit, in assessing the propriety of nationwide class actions, have held that California's consumer protection statutes are materially different from those in other states.") (collecting cases).

[32] *Compare* **CLRA:** 3 years from date of improper practice (Cal. Civ. Code § 1783); **UCL:** 4 years (Cal. Bus. & Prof. Code § 17208); **FAL:** 3 years from discovery of facts constituting fraud (Cal. Bus. & Prof. Code § 17500; Cal. Civ. Proc. Code § 338(d)); *with, e.g.*, **AL:** 1 year from discovery, but no later than 4 years from transaction date (Ala. Code § 8-19-14); **FL:** 4 years from date of alleged violation; no "discovery rule" (Fla. Stat. Ann. § 95.11(3)); **ME:** 6 years from discovery (Me. Rev. Stat. Ann. tit. 14, § 752); **NY:** 3 years from alleged violation; no "discovery rule" (*Gaidon v. Guardian Life Ins.*, 750 N.E.2d 1078, 1084 (N.Y. 2001)); **TX:** 2 years after occurrence or discovery by reasonable diligence (Tex. Bus. & Prof. Code Ann. § 17.565).

[33] *Compare* **CA:** class actions permitted (Cal. Civ. Code § 1780; Cal. Bus. & Prof. Code §§ 17203, 17535); *with, e.g.*, class actions prohibited in **GA:** Ga. Code Ann. § 10-1-399(a); **LA:** La. Rev. Stat. Ann. § 51:1409(A); **SC:** S.C. Code Ann. § 39-5-140(a). Other jurisdictions address class action mechanism in more nuanced fashions. *E.g.*, **FL:** class actions not expressly permitted or prohibited, but courts decide FDUTPA claims within class action context (*see* Fla. Stat. § 501.202(2); *e.g.*, *Philip Morris v. Hines*, 883 So. 2d 292, 294 (Fla. 4th Dist. Ct. App. 2003)); **NY:** class actions permitted, but class members may not receive more than actual

All of these are Apple's filings in other cases, where they got warnings from the court about single spaced lines.

13. In addition, not specific to Apple, this District has warned parties in other cases about line spacing when the spacing is closer to one-line.



Case 4:22-md-03047-YGR Document 506 Filed 12/18/23 Page 2 of 3

Pursuant to Discovery Management Order No. 1 (Dkt. 503), the Meta Defendants submit the following response to the State AG Plaintiffs' Position Statement Regarding Protective Order (Dkt. 478), and to their proposed language for a carve-out exemption from Section 7.6 thereof (Dkt. 502).

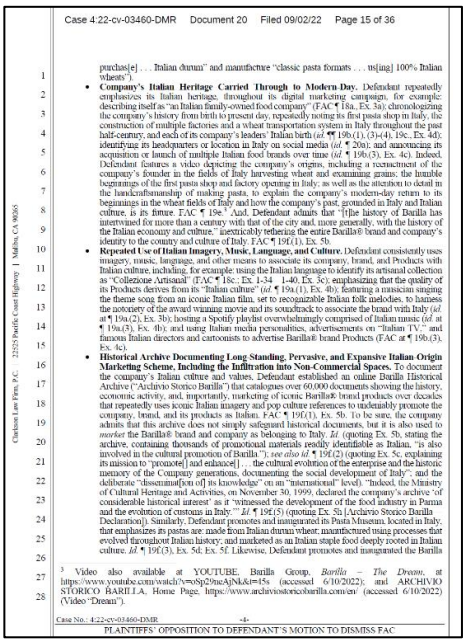
This Court should deny the State AG Plaintiffs' request to remove the Highly Confidential expert disclosure provision (Section 7.6) from the Protective Order and/or to add a carve-out that would effectively exempt the State AG Plaintiffs' experts from that provision.

In support of their request to remove Section 7.6 from the Protective Order, the State AG Plaintiffs principally argue that Meta agreed to a different set of confidentiality protections for documents produced to the State AGs in connection with the AGs' pre-suit *investigation*. But that has no bearing on the terms applicable to Meta's Highly Confidential documents in this *litigation*. By its terms, the pre-suit Confidentiality Agreement between Meta and the State AG Plaintiffs is limited to "the 'Investigation'" brought by the State AGs, and covers only documents "produced in response to formal or informal discovery requests … *in connection with [the AGs'] Investigation*." Confidentiality Agreement at 1 (attached as **Exhibit 1**), ¶ 10 (emphasis added). Paragraph 6 of the Confidentiality Agreement expressly contemplates that, to the extent the State AGs sought to use documents from their Investigation in litigation, those documents would be governed by "the terms of a protective order *entered in the case*." *Id.* ¶ 6 (emphasis added). The Confidentiality Agreement's sharing provisions are similarly limited to the "furtherance of [the AGs'] *investigation*," *id.* ¶ 14; they do not apply to *subsequent litigation* filed by the State AGs. Accordingly, to the extent the State AG Plaintiffs wish to continue using any experts retained in connection with their Investigation as *litigation* experts, and those experts have been or will be permitted access to Meta's Highly Confidential material, those experts should be disclosed to the Meta Defendants pursuant to Section 7.6—for the same reasons any other Party's experts should be disclosed to Meta in such scenario.[1]

The State AG Plaintiffs' proposed "carve-out" language should be rejected for similar reasons. That carve-out would exempt "information or material received outside of this [litigation]" from Section 7.6, regardless of whether such material is also produced *in* this litigation. Such a carve-out would allow the State AG Plaintiffs an end-run around Section 7.6 insofar as the Highly Confidential material from Meta they share with their experts was produced both in the course of the State AGs' pre-suit Investigation and also to Plaintiffs in this litigation. The State AG Plaintiffs provide no reason why Meta should be afforded less protection when their Highly Confidential documents are shared with litigation experts for the State AGs as opposed to other Parties' litigation experts, and there is none.

[1] To be clear, the Meta Defendants are not requesting that the State AG Plaintiffs' experts return any Highly Confidential material to which they may already have access—only that those experts be disclosed *to the extent* the State AGs wish to continue using them in connection with this litigation.

META DEFENDANTS' SUPPLEMENTAL RESPONSE TO STATE AG PLAINTIFFS' SUPPLEMENTAL BRIEFING REGARDING PROTECTIVE ORDER (DKT. 478)



Case 4:22-cv-03460-DMR Document 20 Filed 09/02/22 Page 15 of 36

Charlene Law Firm, P.C. · 22525 Pacific Coast Highway · Malibu, CA 90265

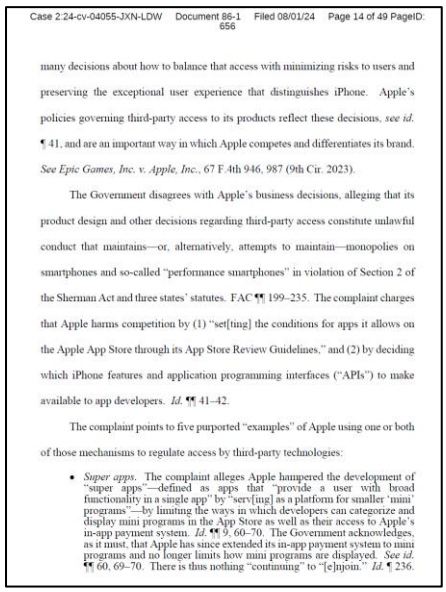
purchas[e] . . . Italian durum" and manufacture "classic pasta formats . . . us[ing] 100% Italian wheats").

- **Company's Italian Heritage Carried Through to Modern Day.** Defendant repeatedly emphasizes its Italian heritage, throughout its digital marketing campaign, for example: describing itself as "an Italian family-owned food company" (FAC ¶ 18a., Ex. 3a); chronologizing the company's history from birth to present day, repeatedly noting its first pasta shop in Italy, the construction of multiple factories and a wheat transportation system in Italy throughout the past half-century, and each of its company's leaders' Italian birth (*id.* ¶¶ 19b.(1), (3)-(4), 19c., Ex. 4d); identifying its headquarters or location in Italy on social media (*id.* ¶ 20n); and announcing its acquisition or launch of multiple Italian food brands over time (*id.* ¶ 19b.(3), Ex. 4c). Indeed, Defendant features a video depicting the company's origins, including a reenactment of the company's founder in the fields of Italy harvesting wheat and examining grains; the humble beginnings of the first pasta shop and factory opening in Italy; as well as the attention to detail in the handcraftsmanship of making pasta, to explain the company's modern-day return to its beginnings in the wheat fields of Italy and how the company's past, grounded in Italy and Italian culture, is its future. FAC ¶ 19e.[3] And, Defendant admits that "[t]he history of Barilla has intertwined for more than a century with that of the city and, more generally, with the history of the Italian economy and culture," inextricably tethering the entire Barilla® brand and company's identity to the country and culture of Italy. FAC ¶ 19f.(1), Ex. 5b.
- **Repeated Use of Italian Imagery, Music, Language, and Culture.** Defendant consistently uses imagery, music, language, and other means to associate its company, brand, and Products with Italian culture, including, for example: using the Italian language to identify its artisanal collection as "Collezione Artisanale" (FAC ¶ 18c.; Ex. 1-34, 1-40, Ex. 3c); emphasizing that the quality of its Products derives from its "Italian culture" (*id.* ¶ 19a.(1), Ex. 4b); featuring a musician singing the theme song from an iconic Italian film, set to recognizable Italian folk melodies, to harness the notoriety of the award winning movie and its soundtrack to associate the brand with Italy (*id.* at ¶ 19a.(2), Ex. 3b); hosting a Spotify playlist overwhelmingly comprised of Italian music (*id.* at ¶ 19a.(3), Ex. 4b); and using Italian media personalities, advertisements on "Italian TV," and famous Italian directors and cartoonists to advertise Barilla® brand Products (FAC at ¶ 19b.(3), Ex. 4c).
- **Historical Archive Documenting Long-Standing, Pervasive, and Expansive Italian-Origin Marketing Scheme, Including the Infiltration into Non-Commercial Spaces.** To document the company's Italian culture and values, Defendant established an online Barilla Historical Archive ("Archivio Storico Barilla") that catalogues over 60,000 documents showing the history, economic activity, and, importantly, marketing of iconic Barilla® brand products over decades that repeatedly uses iconic Italian imagery and pop culture references to undeniably promote the company, brand, and its products as Italian. FAC ¶ 19f.(1), Ex. 5b. To be sure, the company admits that this archive does not simply safeguard historical documents, but it is also used to *market* the Barilla® brand and company as belonging to Italy. *Id.* (quoting Ex. 5b, stating the archive, containing thousands of promotional materials readily identifiable as Italian, "is also involved in the cultural promotion of Barilla."); *see also id.* ¶ 19f.(2) (quoting Ex. 5c, explaining its mission to "promote[] and enhance[] . . . the cultural evolution of the enterprise and the historic memory of the Company generations, documenting the social development of Italy"; and the deliberate "dissemina[tion of] its knowledge" on an "international" level). "Indeed, the Ministry of Cultural Heritage and Activities, on November 30, 1999, declared the company's archive 'of considerable historical interest' as it 'witnessed the development of the food industry in Parma and the evolution of customs in Italy.'" *Id.* ¶ 19f.(5) (quoting Ex. 5b [Archivio Storico Barilla Declaration]). Similarly, Defendant promotes and inaugurated its Pasta Museum, located in Italy, that emphasizes its pastas are made from Italian durum wheat, manufactured using processes that evolved throughout Italian history, and marketed as an Italian staple food deeply rooted in Italian culture. *Id.* ¶ 19f.(3), Ex. 5d; Ex. 5f. Likewise, Defendant promotes and inaugurated the Barilla

[3] Video also available at YOUTUBE, Barilla Group, *Barilla – The Dream*, at https://www.youtube.com/watch?v=o8p20nicAjNk&t=15s (accessed 6/10/2022); and ARCHIVIO STORICO BARILLA, Home Page, https://www.archiviostoricobarilla.com/en/ (accessed 6/10/2022) (Video "Dream").

Case No.: 4:22-cv-03460-DMR -4-

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FAC



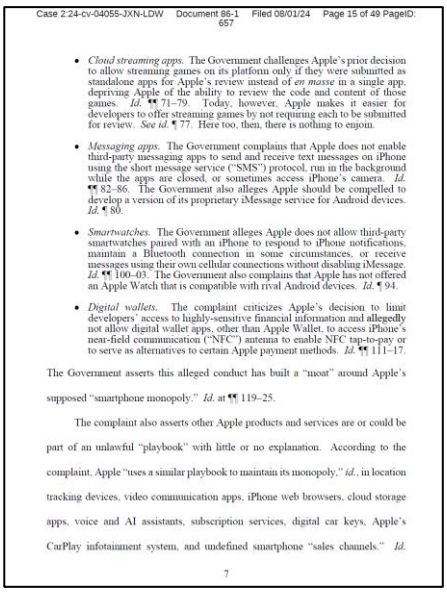
Case 2:24-cv-04055-JXN-LDW Document 86-1 Filed 08/01/24 Page 14 of 49 PageID: 656

many decisions about how to balance that access with minimizing risks to users and preserving the exceptional user experience that distinguishes iPhone. Apple's policies governing third-party access to its products reflect these decisions, *see id.* ¶ 41, and are an important way in which Apple competes and differentiates its brand. *See Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 987 (9th Cir. 2023).

The Government disagrees with Apple's business decisions, alleging that its product design and other decisions regarding third-party access constitute unlawful conduct that maintains—or, alternatively, attempts to maintain—monopolies on smartphones and so-called "performance smartphones" in violation of Section 2 of the Sherman Act and three states' statutes. FAC ¶¶ 199–235. The complaint charges that Apple harms competition by (1) "set[ting] the conditions for apps it allows on the Apple App Store through its App Store Review Guidelines," and (2) by deciding which iPhone features and application programming interfaces ("APIs") to make available to app developers. *Id.* ¶¶ 41–42.

The complaint points to five purported "examples" of Apple using one or both of those mechanisms to regulate access by third-party technologies:

- *Super apps.* The complaint alleges Apple hampered the development of "super apps"—defined as apps that "provide a user with broad functionality in a single app" by "serv[ing] as a platform for smaller 'mini' programs"—by limiting the ways in which developers can categorize and display mini programs in the App Store as well as their access to Apple's in-app payment system. *Id.* ¶¶ 9, 60–70. The Government acknowledges, as it must, that Apple has since extended its in-app payment system to mini programs and no longer limits how mini programs are displayed. *See id.* ¶¶ 60, 69–70. There is thus nothing "continuing" to "[e]njoin." *Id.* ¶ 236.



Case 2:24-cv-04055-JXN-LDW Document 86-1 Filed 08/01/24 Page 15 of 49 PageID: 657

- *Cloud streaming apps.* The Government challenges Apple's prior decision to allow streaming games on its platform only if they were submitted as standalone apps for Apple's review instead of *en masse* in a single app, depriving Apple of the ability to review the code and content of those games. *Id.* ¶¶ 71–79. Today, however, Apple makes it easier for developers to offer streaming games by not requiring each to be submitted for review. *See id.* ¶ 77. Here too, then, there is nothing to enjoin.
- *Messaging apps.* The Government complains that Apple does not enable third-party messaging apps to send and receive text messages on iPhone using the short message service ("SMS") protocol, run in the background while the apps are closed, or sometimes access iPhone's camera. *Id.* ¶¶ 82–86. The Government also alleges Apple should be compelled to develop a version of its proprietary iMessage service for Android devices. *Id.* ¶ 80.
- *Smartwatches.* The Government alleges Apple does not allow third-party smartwatches paired with an iPhone to respond to iPhone notifications, maintain a Bluetooth connection in some circumstances, or receive messages using their own cellular connections without disabling iMessage. *Id.* ¶¶ 100–03. The Government also complains that Apple has not offered an Apple Watch that is compatible with rival Android devices. *Id.* ¶ 94.
- *Digital wallets.* The complaint criticizes Apple's decision to limit developers' access to highly-sensitive financial information and allegedly not allow digital wallet apps, other than Apple Wallet, to access iPhone's near-field communication ("NFC") antenna to enable NFC tap-to-pay or to serve as alternatives to certain Apple payment methods. *Id.* ¶¶ 111–17.

The Government asserts this alleged conduct has built a "moat" around Apple's supposed "smartphone monopoly." *Id.* at ¶¶ 119–25.

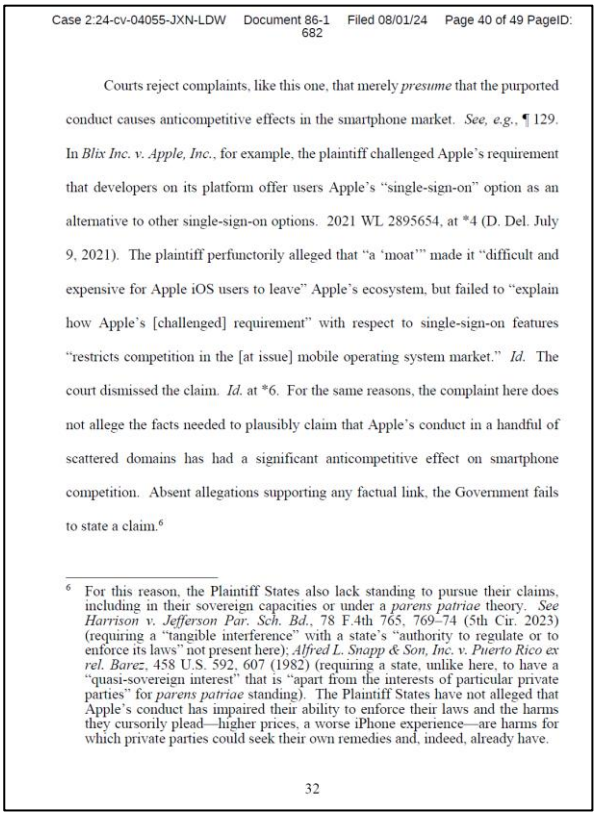
The complaint also asserts other Apple products and services are or could be part of an unlawful "playbook" with little or no explanation. According to the complaint, Apple "uses a similar playbook to maintain its monopoly," *id.*, in location tracking devices, video communication apps, iPhone web browsers, cloud storage apps, voice and AI assistants, subscription services, digital car keys, Apple's CarPlay infotainment system, and undefined smartphone "sales channels." *Id.*

7

Example Northern District cases with warnings about spacing. Most involved single-spaced lines.

C. Apple's counsel have also used similar fonts and formatting but also with single-spaced line abuse.

14. Counsel representing Apple have even recently used nearly the exact same formatting that Apple complains about here, but when Apple did it, Apple also used extensive single-spaced footnotes.

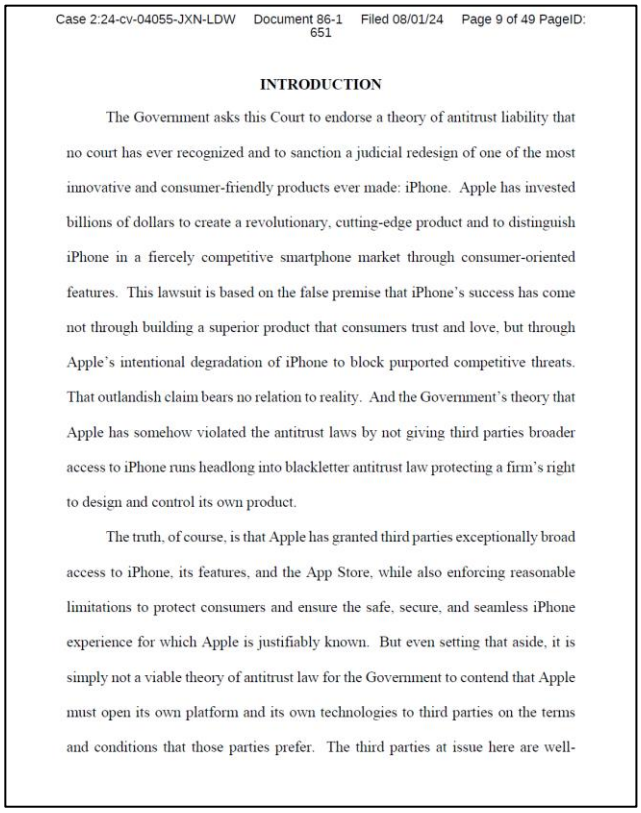


Case 2:24-cv-04055-JXN-LDW Document 86-1 Filed 08/01/24 Page 40 of 49 PageID: 682

Courts reject complaints, like this one, that merely *presume* that the purported conduct causes anticompetitive effects in the smartphone market. *See, e.g.*, ¶ 129. In *Blix Inc. v. Apple, Inc.*, for example, the plaintiff challenged Apple's requirement that developers on its platform offer users Apple's "single-sign-on" option as an alternative to other single-sign-on options. 2021 WL 2895654, at *4 (D. Del. July 9, 2021). The plaintiff perfunctorily alleged that "a 'moat'" made it "difficult and expensive for Apple iOS users to leave" Apple's ecosystem, but failed to "explain how Apple's [challenged] requirement" with respect to single-sign-on features "restricts competition in the [at issue] mobile operating system market." *Id.* The court dismissed the claim. *Id.* at *6. For the same reasons, the complaint here does not allege the facts needed to plausibly claim that Apple's conduct in a handful of scattered domains has had a significant anticompetitive effect on smartphone competition. Absent allegations supporting any factual link, the Government fails to state a claim.[6]

[6] For this reason, the Plaintiff States also lack standing to pursue their claims, including in their sovereign capacities or under a *parens patriae* theory. *See Harrison v. Jefferson Par. Sch. Bd.*, 78 F.4th 765, 769–74 (5th Cir. 2023) (requiring a "tangible interference" with a state's "authority to regulate or to enforce its laws" not present here); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (requiring a state, unlike here, to have a "quasi-sovereign interest" that is "apart from the interests of particular private parties" for *parens patriae* standing). The Plaintiff States have not alleged that Apple's conduct has impaired their ability to enforce their laws and the harms they cursorily plead—higher prices, a worse iPhone experience—are harms for which private parties could seek their own remedies and, indeed, already have.

32



Case 2:24-cv-04055-JXN-LDW Document 86-1 Filed 08/01/24 Page 9 of 49 PageID: 651

INTRODUCTION

The Government asks this Court to endorse a theory of antitrust liability that no court has ever recognized and to sanction a judicial redesign of one of the most innovative and consumer-friendly products ever made: iPhone. Apple has invested billions of dollars to create a revolutionary, cutting-edge product and to distinguish iPhone in a fiercely competitive smartphone market through consumer-oriented features. This lawsuit is based on the false premise that iPhone's success has come not through building a superior product that consumers trust and love, but through Apple's intentional degradation of iPhone to block purported competitive threats. That outlandish claim bears no relation to reality. And the Government's theory that Apple has somehow violated the antitrust laws by not giving third parties broader access to iPhone runs headlong into blackletter antitrust law protecting a firm's right to design and control its own product.

The truth, of course, is that Apple has granted third parties exceptionally broad access to iPhone, its features, and the App Store, while also enforcing reasonable limitations to protect consumers and ensure the safe, secure, and seamless iPhone experience for which Apple is justifiably known. But even setting that aside, it is simply not a viable theory of antitrust law for the Government to contend that Apple must open its own platform and its own technologies to third parties on the terms and conditions that those parties prefer. The third parties at issue here are well-

U.S. v. Apple, 2:24-cv-04055 (D.N.J.), Dkt. No. 86-1, filed by Apple Inc on 8/1/24

D. The delay caused by Plaintiff's late filing was minimal.

15. The delay of only a couple days was a very minimal delay – and Plaintiff filed the complaint as soon as there was a presentable draft to file. Plaintiff has no objection if Defendant is given two extra days beyond their original

deadline, to make up for here delay. However, here the Defendant is intentionally causing even more delays – and asking for court approval of additional delays, all which is prejudicial.

16. The court order did provide a deadline and Plaintiff regrets not meeting that deadline, however, an example of a dismissal of action for failure to obey court's order that plaintiff replead after failing to satisfy requirement of Rule 8 was proper where two and one half months passed beyond 20 days allowed by court's order with no effort on plaintiff's part to comply. *Agnew v. Moody*, C.A.9 (Cal.) 1964, 330 F.2d 868, certiorari denied 85 S.Ct. 137, 379 U.S. 867, 13 L.Ed.2d 70. Two days and two months are very different durations.

17. Here, Plaintiff also already apologized for the delay, explained the delay, and complained to Defendant that the delay was caused by them – as her PTSD symptoms were severely disabling due to Apple's continued harassment of Plaintiff within and outside this lawsuit – including Apple Global Security calling her directly to harass her about this lawsuit just last month. (See Def's Declaration Exhibit).

E. This court has issued orders to Plaintiff with requirements that exceed the Federal Rules of Civil Procedure requirements.

18. This court has issued a number of custom orders to Plaintiff that have requirements well beyond the FRCP. District should not dismiss plaintiff's action for failure to comply with order to supply complaint that substantially exceeded requirements of rules of civil procedure. *Wynder v. McMahon*, C.A.2 (N.Y.) 2004, 360 F.3d 73,. *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) Rule 8 would become a dead letter if district courts were permitted to supplement the Rule's requirements through court orders demanding greater specificity or elaboration of legal theories, and then to dismiss the complaint for failure to comply with those orders. Plaintiff respects the orders she is given and attempts to comply with

them, but sometimes cannot comply with them, and apologizes and is regretful about it.

F. A dismissal with prejudice would be too harsh.

19. Dismissal of a case for disobedience of a court order is an exceedingly harsh sanction which should be imposed only in extreme cases, and then only after exploration of lesser sanctions. *Pond v. Braniff Airways, Inc.*, 453 F.2d 347 (5th Cir. 1972)*; Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885 (5th Cir.), cert. denied, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed. 1387 (1968). Failure to amend a complaint after it has been dismissed with leave to amend is not such an extreme case of disobedience, if it is disobedience at all. *Mann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75, 76 (5th Cir. 1973)

20. Here, if the court feels the Plaintiff should be punished, there are many other options available to the court other than a dismissal with prejudice.

21. Such a dismissal is a severe sanction, and should be used only in extreme circumstances and as a last resort, where there is a clear record of delay or contumacious conduct8 or intentional disobedience of the court's order, and where lesser sanctions would not be appropriate. Lesser sanctions will normally suffice in all but the most flagrant of circumstances. Thus, where the court does not even consider lesser sanctions, the appellate court may find an abuse of discretion. *Oliva v. Sullivan*, 958 F.2d 272, 22 Fed. R. Serv. 3d 554 (9th Cir. 1992) *Jackson v. City of New York,* 22 F.3d 71, 28 Fed. R. Serv. 3d 1392 (2d Cir. 1994)

22. Dismissal is an extraordinary remedy, which should not be invoked where failure to comply is inadvertent or excusable, or when the effect would be to punish an innocent litigant for the transgressions of his lawyer. *Dyotherm Corp. v. Turbo Machine Co.*, 392 F.2d 146 (3d Cir. 1968); *Council of Federated Organizations v. Mize*, 339 F.2d 898 (5th Cir. 1964); *Woodham v. American Cystoscope Co.*, 335 F.2d 551 (5th Cir. 1964); *Meeker v. Rizley,* 324 F.2d 269 (10th

Cir. 1963); 5 J.Moore, Federal Practice P41.12 at 1139.

23. Even when the plaintiff has caused delay or engaged in contumacious conduct before the district court dismisses for failure to comply with the court order it must consider whether the ends of justice would be served better by a lesser sanction. *Guyer v. Beard,* 907 F.2d 1424 (3d Cir. 1990). 10 Wright and Miller et al., Federal Practice and Procedure, Civil § 2369 (4th ed.).

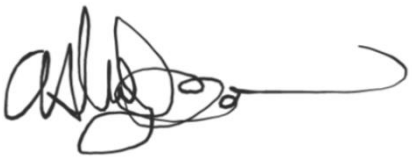
IV. Conclusion

24. In conclusion, Apple's arguments about the delay and formatting are without basis, are a delay tactic, is an attempt to harass the Plaintiff, and should be denied.

25. Plaintiff has replied to both Apple's motions to dismiss and for a shorter deadline in order to empower the court to quickly deny these motions and to order Apple to file a response to the Complaint. Apple fired Plaintiff over there years ago, and this Docket is up to 152 entries, but Apple still has not filed an Answer. Apple needs to file an answer.

Dated: Nov. 15 2024

Signature:



/s/ Ashley M. Gjovik

Pro Se Plaintiff

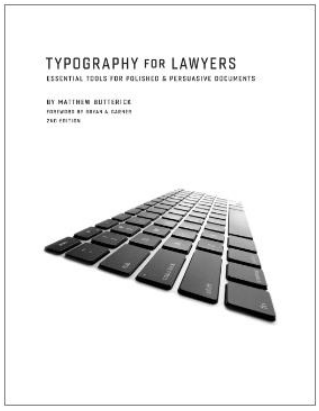
Email: legal@ashleygjovik.com

Physical Address:
Boston, Massachusetts

Mailing Address:
2108 N St. Ste. 4553 Sacramento, CA, 95816

Phone: (408) 883-4428

V. EXHIBIT A: TYPOGRAPHY FOR LAWYERS



E·qui·ty, *n.* A text family designed by Matthew Butterick. Available only at mbtype.com.

Figure 1: https://typographyforlawyers.com/equity.html

What purpose do line numbers serve today? I have no idea. It's just another obsolete TYPEWRITER HABIT. As a pin-cite system, paragraph numbers make more sense. Page and line references are dependent on a specific paginated rendering of a document. Paragraph numbers are not.

Figure 3: https://typographyforlawyers.com/line-numbers.html

Typography for Lawyers

2nd edition

Figure 4: https://typographyforlawyers.com/

line spacing

120–145% of the point size

Line spacing is the vertical distance between lines of text. Most writers use either double-spaced lines or single-spaced lines—nothing in between—because those are the options presented by word processors.

These habits are obsolete TYPEWRITER HABITS. Originally, a typewriter's platen could only move the paper vertically in units of a single line. Therefore, line-spacing choices were limited to one, two, or more lines at a time. Single-spaced typewritten text is dense and hard to read. But double-spacing is still looser than optimal.

The traditional term for line spacing is **leading** (rhymes with **bedding**), so named because traditional print shops put strips of lead between lines of type to increase vertical space.

Most courts adopted their line-spacing standards in the typewriter era. That's why court rules usually call for double-spaced lines. On a typewriter, each line is the height of the font, thus double spacing means twice the font size. So if you're required to use a 12-point font, double line spacing means 24 points.

Curiously, the so-called "double" line-spacing option in your word processor doesn't produce true double line spacing. Microsoft Word's "double" spacing, for instance, is about 15% looser, and it varies depending on the font. To get accurate spacing, you should always set it yourself, exactly.

Figure 2 https://typographyforlawyers.com/line-spacing.html

How to interpret court rules

Among legal documents, court filings must conform to the narrowest typographic restrictions—court rules. But except for a few jurisdictions, court rules still give lawyers plenty of typographic latitude.

So why do 99.99% of the court filings in any jurisdiction look alike?

One reason is the bandwagon effect. Lawyers usually assume that all the other lawyers are following the rules, so if everyone uses 12-point Times New Roman or puts two vertical lines in the left margin, it must be that the court demands it. Possible, but unlikely. Read your court rules carefully—you'll probably be surprised at how much is left to your discretion.

Another reason is fear. "The judge will sanction me because my filings aren't as ugly and hard to read as everyone else's." Again—possible, but unlikely. If your typography conforms to the court rules in good faith, you should be on solid ground. No judge or clerk ever complained about the typography in my filings. Nor has any reader of this book reported any similar consequences.

A third reason is force of habit. To create today's filing, lawyers will often just start with last week's filing, which was based on the filing from the week before that, and so on back to about 1979. Formatting choices get entrenched even if they don't relate to the rules.

A fourth reason is lack of typographic skill. How do you depart from the usual dreck while still adhering to the rules? Armed with the information in this book, you should have no problem understanding where court rules are strict and where they're flexible.

③ LINE SPACING rules should be interpreted arithmetically, not as word-processor lingo. If a rule calls for double-spaced lines, set your line spacing to exactly twice the point size of the body text. Don't rely on the "Double" line-spacing option in your word processor, which may not be equivalent. For instance, in Word, "Double" line spacing is about 15% larger than true double spacing. This reduces the number of lines per page.

④ Avoid putting rules and borders within or around the page that aren't explicitly required. It clutters the page. For example, in Los Angeles courts, almost every litigator puts two vertical lines on the left edge of the page and one vertical line on the right. But this practice is not required by any rule. In state court, the line on the left is optional—you can use a solid single or double line, but you can also use a "vertical column of space at least ⅛ inch wide". (Calif. Rule of Court 2.108(4).) Nothing is required on the right side. Meanwhile, our federal court requires no vertical lines on either side. Follow the rules, not the crowd.

WHY DO COURT RULES ABOUT TYPOGRAPHY EXIST?

Consistency of typography in court filings helps ensure fairness to the parties. For instance, in jurisdictions that use page limits, if lawyer A sets his briefs at 12 point and lawyer B sets hers at 10 point, then lawyer B will get more words per page. Court rules about typography prevent abuse of these limits.

Court rules about typography also exist as a convenience to the judge and the court staff. Judges don't want to read sheaves of 9-point text. Rules that set minimum page margins or point size ensure a minimum standard of legibility.

As you put your typographic discretion to work, keep these two goals in mind. Don't expect your judge to be happy if you exploit typographic loopholes in the rules that defeat these goals.

FOR INSTANCE, THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA CALLS FOR A PROPORTIONALLY SPACED FONT THAT'S 14 POINT OR LARGER. (C.D. CAL. L.R. 11-3.1.1.) HOW ABOUT THIS ONE? IT'S PROPORTIONALLY SPACED. IT'S SET LARGER THAN 14 POINT. TECHNICALLY SPEAKING, I'VE COMPLIED WITH THE RULE. BUT WILL A FEDERAL JUDGE BE IMPRESSED WITH HOW I'VE INTERPRETED THE RULE? NO WAY.

Conversely, you shouldn't worry about typographic improvements that result in fewer words per page, like larger page margins. Unless you need every word or every page allocated to you—and good legal writers never do—why not use the extra white space to improve the typography? (See MOTIONS for an example.)

Keep in mind that court rules about typography are not designed to produce good typography. That's your job. Court rules set minimums and maximums. They're usually phrased in terms of "at least" and "no more than". Very rarely do they completely eliminate discretion.

I'm not suggesting you should use this discretion to be different for the sake of being different. Rather, you should use this discretion to fill in what the court rules deliberately leave incomplete.

Figure 5: https://typographyforlawyers.com/how-to-interpret-court-rules.html

From: https://typographyforlawyers.com/how-to-interpret-court-rules.html